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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. ANGELO RODDY LEONARDI, Defendant and Appellant.	C086459 (Super. Ct. No. TF1500067)

After his motion to suppress evidence was denied, defendant Angelo Roddy Leonardi pled no contest to exportation or transportation of marijuana and received three years of formal probation. He now appeals from the denial of the motion to suppress, contending that he was subjected to an unreasonably prolonged traffic stop without reasonable suspicion of criminal activity. Acknowledging that his challenge is forfeited because trial counsel failed to renew the motion to suppress before defendant entered his plea (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897 (*Lilienthal*)), defendant contends counsel was ineffective for failing to renew the motion.

We conclude the challenge is forfeited and trial counsel was not ineffective because there is no reasonable probability defendant would have obtained a more favorable ruling had he renewed the motion.

FACTUAL AND PROCEDURAL BACKGROUND

A complaint filed on October 30, 2015, charged defendant and codefendant Jose Luis Santiago with sale or transportation of marijuana and possession of marijuana for sale.

On September 6, 2016, the magistrate conducted a joint preliminary hearing and motion to suppress evidence. The magistrate denied the motion to suppress and held defendant to answer on both counts.

On December 13, 2016, an information was filed that charged the same offenses as the original complaint. On the same date, the first count was amended to charge "exportation or transportation of marijuana," and the possession count was amended to a misdemeanor.

On June 20, 2017, defendant pled no contest to the first count, on condition that the possession count would be dismissed.

On November 28, 2017, the trial court carried out the plea agreement. It suspended imposition of sentence and placed defendant on three years' supervised probation.

On January 26, 2018, defendant filed notice of appeal to challenge the denial of his motion to suppress. The trial court granted a certificate of probable cause.

The evidence at the preliminary hearing/motion to suppress was as follows:

Around 11:41 p.m. on October 8, 2015, California Highway Patrol (CHP) Officer Michael McDonnell, while speaking to a driver he had stopped on eastbound Interstate 80 in Nevada County, heard and saw a silver sedan traveling eastbound on the "rumble strips" past his location. The speed limit in that area was 65 miles per hour; Officer McDonnell visually estimated the sedan's speed at 80 miles per hour.

Terminating his original traffic stop, Officer McDonnell pursued the sedan, which his radar showed was going 73 miles per hour. He conducted a traffic stop on the sedan at around 11:43 or 11:44 p.m. The area of the stop was a remote one.

As Officer McDonnell approached the car's passenger side, he saw there were two occupants, codefendant Santiago (the driver) and defendant (the passenger). The passenger side window was rolled down, which enabled the officer to smell cigarette smoke and the "overwhelming, over strong odor" of air fresheners. He also noticed items in the car, such as fast food wrappers and energy drinks, that were consistent with the possibility the occupants were making a quick turnaround trip to California from another state.

The sedan had a Kansas license plate. Defendant had a Missouri driver's license. Codefendant Santiago had a Florida driver's license. The proof of insurance (not issued in the name of either occupant) was from Missouri. Neither occupant provided Officer McDonnell with vehicle registration. Santiago said he did not know who owned the car. Defendant claimed his mother had bought it and was making payments to someone. Contacting dispatch, the officer learned that the registered owner was Gary Fisher. During the course of the traffic stop, defendant made several calls trying to find out the owner's name, and later said it was "Fisher."

Santiago told Officer McDonnell that he was on vacation with his friend, having traveled to California after visiting Las Vegas; however, he could not say where they had been in California because he did not know the state. Defendant told the officer that he and Santiago had been traveling from San Francisco, which the officer knew to be a major source for marijuana. Defendant said he was responsible for everything in the car, but declined permission to search it.

Officer McDonnell contacted the Truckee Police Department to request that a drug-sniffing dog be sent to the scene. He asked if defendant was willing to wait for the dog to arrive; at first he said he was, but then changed his mind.

Based on his training and experience, Officer McDonnell requested the dog because the car's occupants were coming from a marijuana source area and heading toward a distribution area outside California; their stories about where they had been and where they planned to go were "very vague" at best; the occupants did not appear to be legally associated with the car, which was owned by a different person and insured by yet another; the "overwhelming" odor of air fresheners coming from the car suggested they were masking the odor of marijuana or other illegal substances inside the car; and the fact that the car did not belong to the occupants gave them deniability as to its contents, which is a strategy often used by drug runners. In addition, the fact that this appeared to be a quick turnaround trip to California (evidenced by the fast food wrappers and energy drinks on the floorboard and center console area in the backseat of the car), and that the occupants were heading out of state toward marijuana "consumer states," reinforced the officer's suspicion.

Officer McDonnell was not exactly sure when he requested the dog and when it arrived. He estimated that he made the request 10 to 15 minutes after the traffic stop began, and the dog arrived 28 minutes later; in other words, at least 40 minutes probably elapsed from the initiation of the stop to the arrival of the dog.

At some point before calling for the drug-sniffing dog, Officer McDonnell inquired as to whether the car was stolen. He learned thereafter that it had not been reported stolen.

Truckee Police Officer Andrew Holbrook and his drug-sniffing dog "Trax" arrived at the scene at 12:29 a.m. on October 9, 2015. The call for the dog interrupted Officer Holbrook's activity on another call; he got to the scene as soon as he could.

Within minutes of arriving, Officer Holbrook took Trax to the area of the suspects' car and commanded the dog to sniff. Trax pulled hard on his leash as he approached the passenger side, then sniffed the seam of the car between the passenger door and the rear

door, which showed Officer Holbrook that Trax had detected the odor of a drug he was trained to detect, such as marijuana. He so advised Officer McDonnell.

Searching the car, Officer McDonnell found a camouflage-colored duffel bag in the trunk which held 26 separate sealed one-pound packages of marijuana, with a gross weight of 30.1 pounds. There were nine air fresheners in the car.

Asked about the marijuana, defendant said something about personal use, then laughed. He said he and Santiago owned equal shares of the marijuana, for which he had paid $200 per pound. Defendant had no current medical marijuana recommendation. He lived in Kansas City.

CHP Sergeant Randall Fischer, an expert in drug interdiction, opined that the amount and packaging of the marijuana found in the car, together with the lack of drug paraphernalia, were not consistent with personal use. He believed the drug was being transported for profit, as its value increases when one goes east from California. He noted the same indices of likely drug smuggling by defendant and Santiago that Officer McDonnell had noted when he called for the drug-sniffing dog. He also stated that drug transporters typically work in tandem to take turns driving.

After the hearing, the magistrate obtained simultaneous posthearing supplemental briefs on the motion. Defendant argued the detention was unreasonably prolonged when Officer McDonnell continued it to await the arrival of a drug-sniffing dog; defendant withdrew consent to search the vehicle; and CHP Sergeant Fischer's opinion that there was probable cause to search was an inadmissible legal conclusion. The prosecutor argued the detention was not unreasonably prolonged because the officer diligently pursued a means of investigation reasonably designed to confirm or dispel his suspicions quickly. (Cf. *People v. Russell* (2000) 81 Cal.App.4th 96, 102 (*Russell*).)

The magistrate issued a written decision denying defendant's motion to suppress. The magistrate found the initial traffic stop was based on probable cause, and once Trax alerted to the vehicle there was probable cause to search the vehicle. As for the length of

the detention, Officer McDonnell had formed reasonable suspicion of potential drug trafficking, which justified prolonging the detention to await Trax's arrival, based on objective factors defendant had not refuted. The use of the dog was the least intrusive form of investigation available, and the 28-minute delay to bring the dog to the scene was not unduly burdensome. The magistrate found the facts "strikingly similar" to those of *Russell*, a case decided by this court.

DISCUSSION

Defendant contends the magistrate erred by finding the detention was not unreasonably prolonged. He contends further that if the contention is forfeited because trial counsel failed to renew the motion to suppress before defendant entered his plea, counsel provided ineffective assistance. We conclude the contention is forfeited and counsel did not provide ineffective assistance.

When a defendant's motion to suppress is denied by a trial judge sitting as a magistrate at the preliminary hearing, to preserve the issue for appeal the defendant must either renew the motion to suppress in the superior court or make a section 995 motion to dismiss the charging document. (*Lilienthal*, *supra*, 22 Cal.3d at pp. 896-897; *People v. Hawkins* (2012) 211 Cal.App.4th 194, 199-200.) As defendant concedes, trial counsel's failure to do either forfeits his challenge to the magistrate's ruling. We therefore address his arguments only in light of his claim of ineffective assistance of counsel and conclude the claim fails because defendant cannot show prejudice from the failure to renew the motion. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674, 699]; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

In reviewing the denial of a motion to suppress, we accept the magistrate's factual findings if supported by substantial evidence, but exercise our independent judgment to decide whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

In *Rodriguez v. United States* (2015) 575 U.S. ___ [191 L.Ed.2d 492], where a law enforcement officer made a traffic stop, then continued to detain the suspect in order to await the arrival of a drug-sniffing dog, the United States Supreme Court held that the police may prolong a detention for that purpose only if there is a reasonable suspicion of criminal activity after completing the investigation of the traffic infraction. (*Rodriguez*, at p. ___ [191 L.Ed.2d at pp. 500-501.) Here, the magistrate found under *Rodriguez* that Officer McDonnell had reasonable suspicion of drug trafficking activity, justifying the prolongation of defendant's detention to await the dog's arrival, based on the following objective factors: "(1) direction of travel east-bound on I-80 from a drug source area toward a drug consumption area; (2) inconsistent and vague stories from the driver and passenger regarding the purpose of their travel; (3) the lack of apparent affiliation between the occupants of the vehicle and the owner of the vehicle; (4) the relatively quick turnaround of the trip to a drug source area; and (5) the 'overwhelming' odor from air fresheners within the vehicle." (Cf. *Russell*, *supra*, 81 Cal.App.4th at pp. 99-103 (*Russell*) [overwhelming masking odor coming from car, lack of connection between occupants and alleged owner of car, occupants' inability to produce vehicle registration, occupants' vague and conflicting stories about their travel, alleged origin of trip in a major drug source area].)

Defendant disputes the magistrate's finding of reasonable suspicion and tries to distinguish *Russell*. His attempt is futile.

Defendant asserts that the court in *Russell* focused on " 'the overwhelming masking odor discernible from outside the vehicle' (*Russell***,** *supra*, 81 Cal.App.4th at p. 106)," whereas Officer McDonnell "did not detect any odor until he arrived at the open passenger window, when he noticed air freshener and cigarette smoke." But if Officer McDonnell detected the odor emanating from the open passenger window, that means he discerned it "from outside the vehicle." And, like the officer in *Russell*, he called it

"overwhelming," and the magistrate so found as a matter of fact based on Officer McDonnell's undisputed testimony.

Defendant asserts that Officer McDonnell was unable to detect the odor of marijuana, although he had been able to detect that odor under the masking odor of air freshener in other cases. But in *Russell* also, the officer did not detect the odor of any particular drug beneath the masking odor of air freshener before searching the suspect's car. (*Russell, supra,* 81 Cal.App.4th at pp. 99-101.) *Russell* teaches that the smell of a known masking agent associated with a vehicle (together with other factors also found in this case) may give reasonable suspicion the vehicle is involved in drug activity, regardless of whether the officer can deduce what drug is inside the vehicle before searching it.

Defendant asserts that, although an officer's awareness an area is a "high crime area" can matter to the reasonableness of a detention, the prosecutor did not establish that Interstate 80 eastbound is such an area with respect to drug activity. Since the prosecutor did not attempt to establish that proposition and the magistrate did not make that finding, defendant's point is irrelevant.

Defendant concedes that "there were inconsistencies in the information about the trip given by [the two occupants] and some initial questions regarding ownership of the car," but asserts Officer McDonnell "was satisfied that the men had an affiliation with the car based on the information he received from [defendant] about his mother's purchase, once [defendant] correctly identified the registered owner." However, defendant's mother was not the registered owner, and that person (whose name defendant came up with only after several phone calls) had no apparent connection to defendant or codefendant Santiago. Furthermore, neither suspect could produce vehicle registration and neither one was on the car's insurance. In any event, as Officer McDonnell testified, the fact that the suspects told vague and conflicting stories about where they had been and where they were going, and the fact that they were not legally connected to the car,

which gave them deniability as to its contents, pointed toward a reasonable suspicion that they were involved in drug trafficking.

Lastly, defendant tries to distinguish *Russell* by noting that defendant and codefendant here, unlike the suspects in *Russell*, did not display nervousness when questioned. But defendant does not cite any authority holding that police may not form a reasonable suspicion of criminal activity unless the suspects act nervous.

Defendant does not separately argue that the time elapsed waiting for the drug-sniffing dog to arrive made the detention unreasonably prolonged even if there was reasonable suspicion to begin with. In any event, such an argument would be unavailing. (See *People v. Delgado* (2018) 27 Cal.App.5th 1092, 1103 [84-minute detention not unreasonably prolonged]; *Russell*, *supra*, 81 Cal.App.4th at p. 102.)

Because defendant's challenge to the search lacked merit, he cannot show prejudice from trial counsel's failure to renew the challenge below. Therefore, defendant's ineffective assistance of counsel claim fails. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688 [80 L.Ed.2d at p. 693]; *In re Fields*, *supra*, 51 Cal.3d at p. 1079.)

DISPOSITION

The order denying defendant's motion to suppress is affirmed.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.